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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1995

BERMAN J. WATTS.,

Petitioner,

vs.

MICHAEL P. W. STONE., Secretary of the Army; DEPARTMENT OF THE ARMY, Headquarters United States army Aviation Center and Ft. Rucker,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Berman J. Watts, Jr.
P.O. Box 82123
Atlanta, Georgia
30354
(404) 622-3195

Petitioner Pro Se

5388

QUESTIONS PRESENTED

1.Whether lack of specific congressional grant of authority to define the general finality of judgment except in the specific cases of Section 1291 appeals so confounds the matter as to fail to provide the courts with an "intelligible principle to which it's conduct may be conformed" in matters destructive of substantive due process and violating the separation of powers.

2.Whether the legislative public policy interests of a Rule 59(e) motion to alter or amend the judgment out weigh those served by the atypical time limitation on filing and service.

3.Whether arbitrary application of the Unique Circumstances doctrine violates the due process and equal protection

clauses.

LIST OF PARTIES

United States District Court Judge

Judge Orinda D. Evans

Judge Myron Thomson

Magistrate Allen.L. Chancey

Magistrate McPhearson

Lt. Gen. Ellis D. Parker,
formerly Commander Ft. Rucker
subsequently Dir. Army Staff.
COL. Donald J.Marnon
Garrison Commander subsequently
retired.

Merit Systems Protection Board.
MSPB OfficeMSPB Office of the
Special Counsel*.
EEOC,EEOCORA.
United States Army Civilian
Appellate Review Agency.
M. Cunningham, Administrative
Law Judge
David M. Smith, Chief U.S. Army
Litigation Civilian Employment
Branch, formerly Labor Counselor
at Ft. Rucker
Any Frisk
David Alfred, Asst. U.S.
Attorney
John Elder Wilson, U.S.
Attorney Montgomery, AL
Plain King, present Labor

Counselor at Ft. Rucker.
F.H. Mayer, then Director of the Directorate of Combat Developments at Ft. Rucker since retired.
C.H. Jacobus; Former Manager LHX Division of The Directorate of Combat Developments subsequently retired.

C.M. Waldran, Manager LHX Division , Directorate of Combat Developments
C.F. Auman, EEO Officer,Ft.Rucker
J.B. Truss, MP
Charles Blakely, Supervisor,ORSA DCD
Ronald D. Pfeiffer, a Supervisor in DCD Ft. Rucker.
Ralph C. Fico, Aero Engineer DCD
R. Steele, Aero Engineer Aircraft Development and Test subsequently resigned and employed by Bell Helicopter Textron.
LTC. Sheehy Supervisor, Aircraft Development and Test Activity
R. Wagg, President Army Aviation Board

Employees and Staff

Directorate of Combat Developments
Directorate of Engineering and Housing
Army Aviation Center
Ft. Rucker, Alabama

Army Aviation Center

Ft. Rucker, Alabama

Bell Helicopter Textron; bidder
on LHX(Commanche)
and subsequent employer of
C.H. Jacobus as analyst

Individuals and/or Entities
having access to
suggestions made by Appellant
and subsequently
receiving award or implementing
suggestion.

Decision Making/Investigative
Agencies Involved.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Berman J. Watts, Jr. respectfully requests that a Writ of Certiorari issue to review the judgment

and opinion of the Eleventh Circuit entered in the above entitled proceeding on March 3, 1993.

OPINIONS BELOW

The Eleventh Circuit's opinion has not been reported. A copy of that opinion is set forth in the appendix hereto beginning at page AP-1.

JURISDICTION

Jurisdiction of the district court was invoked as follows:

1.pursuant to Title 28, U.S.C.§1331 and §1346 arising under the Fourteenth Amendment to the Constitution of the United States;

,2.pursuant to the provisions of Title 28, U.S.C. §1343, this being an action to redress deprivation of rights secured by Title 42, U.S.C.§ 1983;

.pursuant to Title 42 U.S.C Sec. 2000e.

et seq. and 42 U.S.C. §1988, as a suit in equity , authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964", 42 U.S.C. ,*et seq.*, providing for injunctive and other relief against race discrimination.

The Northern District Federal Court of Georgia was where such federal jurisdiction was invoked.

On appeal,invoking Title 28 §§1291,1292 jurisdiction the Eleventh Circuit issued an order dismissing the appeal on March 3,1995.

The jurisdiction of this court to review the lower court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime , unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; .....

nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life liberty, or property , without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.*

Supreme Court Rule 10 (a) provides

that a Writ of Certiorari may be granted:

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter....or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

Summary

This case arises out of the Eleventh Circuit Court of Appeals dismissal based on the lack of tolling the Notice of Appeal period during District court consideration and response to a Fed. R. of Civ. P. Rule 59(e) motion to alter or amend the judgment that was more than ten business days after district court judgment. Upon petition for rehearing the Eleventh Circuit panel held that the "Unique Circumstances Doctrine" did not apply because the action indicating the extension of the notice of appeal period was not during the actual period that notice could have been made.

On Jan 14,1994 plaintiff - Appellant Watts filed Objections to the Report and recommendations by the Magistrate. A

order overruling such objections, adopting report and recommendation as the order of the court etc. was entered on July 14,1994 and a copy was ordered mailed to the plaintiff. A judgment order was entered for defendant Michael P.W. Stone against Plaintiff Berman J. Watts on July 14,1994 with a copy ordered mailed to the plaintiff. A motion to alter or amend the judgment order was filed on August 1, 1994. An order denying such motion and noting the lack of response of the defendant was entered on September 1,1994.

Notice of appeal was filed on October 25,1994 within sixty days of the order denying the motion to alter or amend the judgment order. On November 3,1994 a letter directing response to the following jurisdictional question within 14 days was sent by the Appellate court:

"(1) Whether appellant's motion to alter or amend judgment was untimely because it was not served within ten (10) business days of the entry of final judgment. Fed.R. Civil P. 59(e); *Pinion v. Dow Chemical, U.S.A.*, *928* F.2d 1522,1525 (11th Cir.), *cert. denied*, _____U.S. _____, 112 S. Ct. 438 (1991)."

"(2) If the motion was not tolling, whether this appeal is untimely? Fed. R. App. . 4(a)(1)".

Upon submission and consideration of arguments the court's answer essentially addressed the "Unique Circumstances Doctrine as being inapplicable since the notice from the court that mislead plaintiff was not during the period during which a notice could have been timely filed.

The underlying cause is a Title VII (42 U.S.C.2000e,1983,1981)complaint originally filed in Feb 1991. Upon dismissal for alleged lack of service and

upon appeal the Eleventh Circuit remanded the case for trial. An underlying issue then appealed (but precluded by remand for other cause) and sought to be reviewed on appeal here was the default (Rule 55) of the Defendant in failing to respond within the time limits (by a matter of months) under Fed R. Civ. P. 12 despite effective notice and admitted service upon the U.S. Attorney and the Secretary (Stone).

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE ISSUED

SUMMARY

The petition should be granted because arbitrary application of the "unique Circumstances Doctrine (accepting otherwise untimely notice of appeal where court action mislead a pro se litigant into a belief that response time is

tolled while a thus believed valid motion to alter or amend is pending) denies equal protection of law and both procedural and substantive due process.

In addition, authority to define a final judgment is a power specifically delegated by Congress in specific cases but previously usurped in the general case , confounding and thus invalidating such finality. Thus no valid limit can issue form a finality lacking a Constitutionally designated basis.

Public policy interests of the intent generating Fed R. Civ. P. 59(e) outweigh those of the atypical time limitation for such motions filing and service.

REASONS FOR GRANTING THE PETITION

1.The judicial definition of the subject" final decision" lacks a Congressional authorization despite

Congress's clear intent to delegate such power and thus violates "separation of powers" and the Constitution (Article III). Lacking a basis for measurement from such constitutionally invalid "final" decision, any time limit on a Fed R. Civ. 59(e) motion is without a legitimate basis and the involved motion's timeliness as determinant of period for notice of appeal should not cause an appeal to be dismissed that was initiated within sixty days of the subsequent court order denying such motion.

The Eleventh Circuit's failure to address such issue preserves a defect of the rules destructive of justice.

History

The Judiciary Act of 1789 introduces the term final without definition in the

grant of jurisdiction to Appeals Courts over appeals from only a final decree in admiralty and a final judgment or decree at either law or equity. 1: Stat. 73 (1789) Sec.21; Sec. 22; and Sec 25.The Legislative history of such act does not address the definition of the term "final".

The Evarts Act of 1891 established the federal courts of appeals.In granting jurisdiction to those courts, Congress empowered them to review "by appeal or writ of error final decision[s] in the district court." Evarts Act, Ch. 517, 26 Stat. 826 (1891) Section 2,6. Language with regards to appellate review was changed from "judgments or decrees' as indicated in the original Judiciary Act, to appeals from "decision[s]. Only in 1945 was a definition of final judgment provided in *Catlin v. United States* 324

U.S. 229,233 (1945); as a judgment that ends the litigation on the merits leaving only execution to be completed. *Congressional grant regarding the definition of finality.*

Congress specifically enables the Supreme Court to establish the Federal Rules of Civil Procedure as part of the Judicial Improvements Act of 1990 amendment of 28 U.S.C. § 2072 , commonly known as the Rules Enabling Act. Although subsection (c) to section 2072 authorized the Supreme Court to promulgate a rule defining "final" for purposes of Appeal under section 1291 (interlocutory orders and decisions) , *no such authority for the definition of finality overall was specifically authorized.* Thus a definition of a specific case is authorized in the absence of

authorization for the general case of which such specific case is a limited class thereof.

As amended Section 2072 now provides:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeal.

(b) Such rules shall not abridge, enlarge or modify any *substantive* right. All laws in conflict with such rules shall be of no further force or effect after said rules have taken effect.

(c) Such rules may define when a ruling of a district court is final *for the purposes of appeal under Section 1291 of this title.*"

No specific grant of authority for the definition of final for purposes of appeal is made outside of a subclass of Sec. 1291 cases. Yet this Court has previously defined such (general)

finality in *Catlin v. U.S.* U.S. 324 299, 233(1945).

The Supreme Court has held that legislative delegations must be explicit and contain specific details to provide the entity to which the delegation is made with an intelligible principle to which it's conduct may be conformed. Mistretta *vs. United States* 488 U.S. 372-74 (1989). Thus the Court's have proceeded without such a congressional delegation to define a final judgment in *Catlin* as the basis for Appellate jurisdiction. Thus by such usurpation of Congressional authority substantive due process rights are abridged and separation of powers violated per Article III of the Constitution.

The lack of a legitimate basis for the

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"finality" of the subject judgment invalidates any time limitation on a Fed. R. Civ. P 59(e) motion and subsequent appeal. An unconstitutionally defined "final" judgment is too vague a concept to base limitation of crucial Constitutional rights and the substantive due process necessary to their vindication.

2. The atypical time limitation for service of a Rule 59(e) motion to alter or amend the judgment compromises the legislative intent and purpose of the rule.

The public policy interests of such legislative primary purpose outweigh that of the atypical time limitation imposed.

Rule 59(e) was added to Rule 59 by amendment in 1946 expressly for a situation such as that arising in

Boaz v.Mutual Life Ins. Co. of New York 146 F.2d 321 Eighth Cir. (1944) to make clear that district court possesses the power asserted in that case to alter or amend a judgment after it's entry. Rule 6(c) was asserted in that case as emphasizing the denial of such power in the absence of such expressed power in then new rules 50(a),41(a),41(b) whereas 50(b) does expressly state such power in the case of a motion for a directed verdict at the close of evidence:

"The contentions are not sustained. Prior to Rule 50(b), in cases where the trial court was required to rule on a motion for directed verdict immediately before submission of the case to the jury, it had been held that the court could not enter a judgment on the motion after the verdict came in, although persuaded that it's ruling on the motion was erroneous. Rule 50(b) was mainly to avoid the necessity of new trial under those circumstances . *There was no such occasion to reserve the Authority to correct errors in proceedings under Rules 50(a), 41(a) or 41(b)*. The power of the court to dismiss a jury case if it concludes that the plaintiff has no sufficient evidence is

recognized in Rule 41(b), and if the court rules erroneously....
it has the power to correct its error throughout the term. Rule 6(c) [Since Rescinded. Feb 28, 1966, eff. July 1,1966] does not, either expressly or by implication , deprive the court of such inherent power."*Boaz at 322.*

Thus the primary purpose of Rule 59(e) is historically and legislatively rooted in a prior case whereas the clause limiting such time for motion under such rule has no such history but simply appears as a means of presumably limiting the cases appealed by means of a procedural time limit differing from the norm of others in the Fed R. of Civ .P. Such limitation attacks the primary purpose of such Rules (Rule 1 of Fed R. of Civ. P). and in light of technological changes permitting swift sure and verified notice (eg.. email, fax, phone message services) since such time limit's adoption, preserves an archaic practice where such conservatism

is destructive of substantive due process and the efficiency of the courts. Moreover the rule making authority granted the Court in 28 U.S.C. 2072 (b) precludes the abridgement of any substantive right such as that of substantive due process including district and appellate court review.

Absent such effectively illegitimate and atypical limitation Petitioner's 's motion should have been accepted as tolling the time for appeal so that such time is measured from the district court's September 1, denial of the motion to alter or amend the judgment.

3. The appeal should not be dismissed due to the "Unique Circumstances Doctrine".

"Unique Circumstances" doctrine will permit appellant to maintain otherwise untimely appeal if appellant reasonably and in good faith relied upon judicial action that indicated that assertion of right to appeal would be timely , so long as judicial action occurred before expiration of official time period in which appellant could have been given timely notice of appeal, had he not been lulled into inactivity. F.R.A.P. Rule 4(a), 28 U.S.C.A." *Pinion v. Dow Chemical, USA* 928 F.2d 1522,1526,Cert.denied,_____U.S._____________, 112 S. Ct. 438 (1991).

In the subject case the district Court did not dismiss the Fed R. Civ. P. 59(e) motion as untimely but simply denied it stating " The Motion to Alter or Amend the Judgment having been read and considered , same is hereby Denied." Such denials was on August 30,1994 and was entered on the docket on September 1,1994.

By such means , plaintiff was lead to believe that such motion was timely and that by the Appellate rules for cases involving the Government (60 days rather

than 30) time for notice of appeal ran from the notice of entry of such motion as the "final judgment " appealed from. Dismissal as untimely would reasonably have alerted the parties that the last substantive decision was the prior final judgment such motion addressed.

The Eleventh Circuit has specifically indicated that the justification for applying the "Unique Circumstances" exception is more compelling where a pro se litigant is involved.

Pinion v. Dow Chemical ., USA 928 F.2d 1522,1533 Note 11.*Derks v. Dugger,* 833 F.2d 778 (11th Cir. 1987). In such case a failure to file a notice of appeal after the granting of a prior (improper) permission to proceed on appeal has been held as not being grounds to dismiss the appeal:

" The appeal in this case should not be dismissed because the plaintiff was misled by the district Court's September 1, 1994, order into believing that his premature notice of appeal was effective." *See Generally Butler v. Coral Volkswagen, Inc.* 804 F.2d 612 (11th Cir. 1986); *Willis v. Newsome*, 747 F.2d 605 (11th Cir. 1984), *cert. denied*, 475 U.S. 1050, 106 S. Ct. 1273, 89 L.Ed.2d 581 (1986).

The District Court's failure to dismiss as untimely such post trial motion on a timely basis combines with the pro se status of Appellant to indicate a shorter notice of appeal than would be available had the court promptly, properly and explicitly dismissed the post trial motion as untimely, void and without effect. There is also the fact of the receipt of notice of the entry of judgment by mail on so short a basis as to preclude timely submission of such motion. Moreover some six months had passed after "Objection

to the Recommendations of the Magistrate " was answered by such judgment order. In short to assure an adequate response time under the rules plaintiff would have required checking with the clerk by physical visit or proxy/phone every five days for six months or the period of a pending decision to assure that delayed mail delivery and sudden illness or injury does not result in insufficient time for preparation of post trial motion *also necessary to assure preservation of points to* be raised on appeal.

I. The district courts action's affirmatively mislead petitioner to rely upon such act and thus file a notice of appeal within the sixty days from the entry of the disposition of an order to alter or amend the judgment.

A. The facts in this case support the existence of "affirmative judicial action" prior to the expiration of the Notice of appeal period that appellant in good faith reasonably relied upon as indicating a later notice of appeal would be timely. In this case the affirmative representation is made by the combination of the involved and clearly promulgated rule Fed. R. App. P. 4(a) versus the obscure, distributed and necessarily combinatorial nature of the rules regarding timeliness of the subject district court motions,and the district court's action in not rejecting the subject motion as untimely but simply denying such motion (that if effective would have tolled the notice period) prior to the period when such notice of appeal would have been timely. Surely a judiciary that specifically

references Fed R. Civ.P. Rules 50(b),,52(b) and 59 under Fed R. App P (a)(4) should not exclude from such reference Fed R. Civ. P Rules 6((b) where such latter rule has a more drastic effect upon the operation of such appellate rule (affecting notice period) than those Fed R. Civ. P rules that are cited (59(e) etc.) and thus referenced. Unless the total review of all Fed R. Civ. P. Rules is envisioned upon each motion or action within critically limited time frames such unreferenced rule's effect could scarcely be timely detected.It can be argued that such ambiguity and lack of reference among some 86 multipart and interdependent Fed. R. of Civ. P rules when combined with a district court's failure to note such error would at best permit wholesale denial of appeals and

substantive due process and at the worst permit an arbitrary mechanism for selective denial of substantive due process far more inclusive of the pro se litigant than initiated and adequately trained professionals. Surely rules promulgated by the Supreme Court under Congressional authorization are judicial actions of far more scope and effect than any single district court's "affirmative representations". Such action is also prior to any period of timely Notice of Appeal in this case wherein such preexisting lack of reference to related rules combines with district court acts to assure appellant's of a spurious extended Notice of appeal period.

i.Those cases establishing a lack of an "affirmative act" on the part of the judiciary in this or preceding circuits have facts diametrically

opposed to the facts here involved.

"Tn *Gribble v.Harris* 625 F.2d 1173 (5th Cir.1980) the losing party waited thirty-four days after judgment before filing a motion for rehearing.

"Having waited , with no apparent good reason for more than three times the allowable delay period before serving her motion for a new trial, and having faced the appellee's objection to the untimeliness of her motion (an objection raised within the sixty day period allowed for appeal), she was clearly on notice that her motion was not timely and that the delay period for appeal had not been interrupted, and any reliance she might have placed on the district court's entertaining of her motion can hardly be characterized as reasonable *Id.*. at 1174-75."

In this case, petitioner is pro se, and the motion was filed on Monday August 1, after entry of judgment on July 14. No objection as to timeliness was raised and thus no notice of non-interruption of the appeal period given. The precise reasoning of that panel justifying a

lack of reliance upon the district court's entertainment of such motion is utterly lacking in the case now before the court.

It should be noted that the Eleventh Circuit specifically repudiates the harsh holding of *Green v. Bisby*,869 F.2d 1070 (7th Cir. 1989) in note 9. of *Pinion v. Dow Chemical USA* 928 F.2d 1522 (11th Cir. 1991)

"..., we are unwilling to suggest like the Seventh Circuit in *Green, that the finding of a unique circumstances will depend upon a rigid definition of what constitutes a an "affirmative *representation".*

There the Eleventh Circuit states:

.., a formalistic inquiry that focuses *only* on the presence or absence of affirmative statements by the district court is insufficient. ....

"Affirmative representations,..., must be considered in the totality of the circumstances, which includes the reasonableness of a party's conduct.*Kraus v Consolidated Rail Corp.*,899 F.2d 1360],1365[(3rd Cir. 1990.)]"

ii.The facts of this case are

similar to those facts where in an 'affirmative act" on the part of the court was found as cause to apply the "unique circumstances" doctrine.

In *Textor v. Bd. of Regents of N. Ill. Univ.*,711 F.2d 1387(7th Cir 1983) ,"plaintiff's untimely appeal was permitted when it resulted from her reliance on the district court's erroneous consideration of her untimely Fed. R. Civ. P. 59(e) motion; the district court denied the motion on grounds other than untimeliness.."

In the present case a similar justification exists since consideration and denial of the untimely motion was during the period notice of appeal would have, if made, been timely.

In *Willis v. Newsome*, 747 F.2d 605 (11th Cir. 1984), the court clerk erroneously told the appellant that if the notice of appeal was mailed on the thirtieth day after judgment , the motion would be stamped on the day mailed.

Unaware of such extenuating circumstances the original panel dismissed the appeal as untimely but upon rehearing the court remanded to the district court. This court then stated:

"Courts will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred *prior to the expiration of the official time period* such that the appellant could have given timely notice had he not been lulled into inactivity. id. at 606"

B. The case of a pro se litigant presents a more compelling case for the level of "affirmative act" by the court required to invoke the "unique circumstances doctrine.

i. Substantive due process is an overriding consideration given the relative resources of the respondents and the history of this cause.

a. Appellant is a citizen and ex-employee of defendant denied continuing employment by defendant's continuing actions. Appellant member of a class whose against whom discrimination is traditional requiring repeated attempts at new corrective law by congress (13th Amendment, 14th Amendment, Civil Rights Act of 1964 as amended, CRA of 1991). In fact defendant used an incident staged in a deserted area as cause to fire plaintiff so as to avoid the completion of administrative processing of several pending discrimination complaints and thus then maintained a military post employing thousands wherein a glass ceiling was maintained at the GS-09 level for blacks via local promotions.

Respondent-Defendant is the largest of Government agencies charged with the defense. Defendant's duties

include support, defense and protection of the Constitution , yet what has been the history in these matters? So pervasive is the influence of such Defendant's involved unit (FT. Rucker, AL) upon the otherwise moribund economy of the surrounding region of southeast Alabama, that no successful complaint of it's discrimination by a black has ever come run the gauntlet of the Middle District Southern Division Federal District Court of Alabama , where such post is located. This was despite the maintenance of an extraordinarily low glass ceiling for black professional employees, via local promotions, even from some of the best engineering schools in the nation amid rapidly advanced whites from far less reputable local schools with virtually no history - especially in engineering- and white

management with no degree in engineering whatsoever.

This case was on remand from the Eleventh Circuit court because defendant had falsely claimed that the service was defective. Defendant however had been effectively served and was depending on the technicality which requires service upon the Attorney General. Even upon the correction of such defect upon notice defendant pressed such cause for dismissal of complaint. Even though having defaulted by defendant's respondents failure to initially respond the district court endorsed Defendant's position and dismissed complaint necessitating prior appeal to the Eleventh Circuit court. Now respondent continues it's tactics of evasion and misrepresentation. Indeed , defendant has

failed to respond to requests for record probative of it's fraud upon the district court in originally obtaining an underlying judgment. Under such circumstances , defendant need only throw up procedural roadblocks and trickery to prevent the most meritorious of claims from obtaining a fair hearing in an unbiased forum, thwarting substantive due process and the Constitution it's minions have sworn to defend, uphold and protect.

Respondent's resources are vast, yet even thus armed so lacking is it's cause that it seeks to use procedural tricks to subordinate truth and duty to prejudice and deceit.

III. The Eleventh Circuit has first raised "pro se" status as a cause for such more lenient treatment in regard to establishing a lower threshold

for the "unique circumstances doctrine.

a. In *Derks v. Duggers* 835 F2d 778,779 such court states :

" In our opinion, this case , because of the unique circumstances, constitutes a very narrow exception that this court adopted in *Willis v. Newsome*, 747 F.2d 605.606 (11th Cir. 1984) where we held:

" the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity.

In this case petitioner pro se Watts relied upon the Court's action in not simply entertaining a motion but ruling on it within the period for appeal as if such motion (later indicated by this court to be untimely) was timely and thus tolling the Notice of Appeal period. Current rules as established by

the Supreme court and the court's action within such rules in combination with the district court's action affirmatively indicate such tolling as forcefully as they do complaint filing, service and a myriad other procedures. These are not single rules that can be evaluated and , listed and place on a checklist. They are rules that combine interactively to obtain differing results.

To apply such rules, a layman, not a skilled jurist must simultaneously consider Fed . R. Civ. P 6((b)(2); exception, 50(b) and (c)(2)59(b),(d) and(e) ,60(b), and 74(a); and in this case involving a magistrate 28 U.S.C.A..§ 636; and Fed. R. App. P. Rule 4(a)(1),(2),(3),(4),(5),(6).This is to be accomplished while the grounds for a corrective motion on the merits of a

challenge to an erroneous judgment are being composed in the a time frame further shortened by late by notice not made until a portion of such period is consumed.In addition such motion involves an attack upon the work product of a horde of highly trained, skilled, experienced and morally unprincipled professional attorney's using the latest digital information systems and software. The Eleventh Circuit has previously recognized that pro se status is a critical determinant *Derks, Pinion supra* of the judicial "affirmative act" relied upon by appellant as an element" of the unique circumstances" doctrine. As the Eleventh circuit indicated:

"In fact,, a formalistic inquiry that focuses on *only* the presence or absence of affirmative statements by the district court is Insufficient. For example although we believe the "unique

circumstances" doctrine should be narrowly construed, we are unwilling to suggest..... that the finding of unique circumstances will depend upon a rigid definition of what constitutes an "affirmative representation'... "Affirmative representations" in other words must be considered in the totality of the circumstances, which includes the reasonableness of a party's conduct. *Pinion v, Dow Chemical U.S.A.*928 F.2d 1522,1533 note 9. (11th Cir, 1991) "

In this case the affirmative representation is made by the combination of the involved rule and the district court's action in not rejecting the subject motion as untimely but simply denying such motion (that if effective would have tolled the notice period) during the period when such notice of appeal would have been timely. It can be argued that such ambiguity within the rules when combined with the vindication of such district court actions by this court would at best permit wholesale denial of appeals and

substantive due process and at the worst result in an arbitrary mechanism for selective denial of substantive due process.

By such means substantive, and any actual procedural due process is made impossible as is the functioning of such courts in regards to Article III of the Constitution. Under the Fourteenth Amendment's due process and equal protection of law clauses such federal court is also bound. *Hurd v. Hodge* 334 U.S. 24,34-36."actions of federal Courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the Fourteenth Amendment prohibited'.

Denial of the due process clause of the Fifth Amendment of the Constitution is also evident:

"it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial

of the due process of law guaranteed by the Fifth Amendment to the Constitution. *Bolling v. Sharpe* 347 U.S. 497,500.

CONCLUSION SUMMARY AND REMEDY

For the foregoing reasons, petition for certiorari should be granted. The decision by the involved panel should be reversed. The actual issues raised on appeal should be given full hearing and the underlying decision reversed so that the requested relief is granted.

For the foregoing reasons the Rule 59(e) motion should not be held as ineffective for purposes of tolling the Oct. 25,1994 Notice of Appeal. Even in the alternative the appeal should not be dismissed under the "Unique Circumstances Doctrine".

Respectfully submitted,